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No. 95-890

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. WALID A. HINDO,

Petitioner,

vs.

UNIVERSITY OF HEALTH SCIENCES/
THE CHICAGO MEDICAL SCHOOL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ERIC A. OESTERLE
Counsel of Record
DONNA L. MARKS
SONNENSCHEIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

MICHAEL R. BOODEN
Herman M. Finch University of Health Sciences/The Chicago Medical School
3333 Green Bay Road
North Chicago, IL 60064
(708) 578-3321

Attorneys for Respondent University of Health Sciences/The Chicago Medical School (n/k/a Herman M. Finch University of Health Sciences/The Chicago Medical School)

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QUESTIONS PRESENTED

1. Whether Respondent ("University") made a false claim under 31 U.S.C. § 3729 when it asked the North Chicago Veterans Administration Medical Center in North Chicago, Illinois ("NCVAMC") to reimburse it for the salaries and benefits paid by it to University affiliated radiology residents who worked at the NCVAMC during the 1989-90 academic year, but for whom the NCVAMC never obtained funding.

2. Whether the District Court abused its discretion when it denied Petitioner, Walid A. Hindo ("Hindo"), leave to file his Second Amended Complaint.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, University of Health Sciences/The Chicago Medical School (n/k/a Herman M. Finch University of Health Sciences/The Chicago Medical School) ("University"), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Seventh Circuit's decision in this case. That decision is reported at 65 F.3d 608 (1995) and is reprinted in Petitioner's Appendix ("PA"). (PA 1a-14a.)

OPINIONS BELOW

The Seventh Circuit's decision affirmed the District Court's November 29, 1994 judgment in favor of the University at the close of Hindo's case at trial, and the District Court's November 3, 1993 Minute Order denying Hindo's motion for leave to file his Second Amended Complaint. The District Court's opinions are reprinted in PA 15a-29a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

There are no constitutional provisions involved. The statutes involved, 31 U.S.C. §§ 3729 and 3730, are quoted in the Appendix attached to this Brief at A1-A11.

STATEMENT OF THE CASE

On March 8, 1991, Walid A. Hindo ("Hindo") filed a two count complaint against the University. He alleged in Count I that the University violated the False Claims Act when it

sought from NCVAMC reimbursement of the salaries and benefits paid by the University to radiology residents who worked at the NCVAMC during the 1989-90 academic year, but for whom funding had not previously been approved by the Veterans Administration. Count II, dismissed with prejudice at Hindo's request on the first day of trial, alleged that the University submitted to the NCVAMC false time records for those same radiology residents.

As required under the False Claims Act (31 U.S.C. § 3730(b)(2)), Hindo filed his complaint *in camera* under seal and served a copy of it upon the United States Government. The Government had sixty days to "elect to intervene and proceed" with the action. 31 U.S.C. § 3730(b)(2). The Government subsequently notified the District Court pursuant to 31 U.S.C. § 3730(4)(B) that it declined to take over the action. That gave Hindo the right under 31 U.S.C. §§ 3730(4)(B) and (c)(3) "to conduct the action." Hindo's complaint was then unsealed and served upon the University in late November, 1992.

On July 29, 1993, Hindo filed an amended complaint adding a new count (Count III) alleging that the University violated 31 U.S.C. § 3730(h) by threatening to terminate Hindo's tenure and by discharging Hindo from his position as chair of the University's Department of Radiology for reporting the University's supposed fraudulent billing to the NCVAMC. The University moved to dismiss Count III on September 22, 1993 on the grounds that Hindo's Count III claims were barred by his unsuccessful prior state court litigation against the University for retaliatory discharge, *Hindo v. University of Health Sciences/The Chicago Medical School*, 237 Ill. App. 3d 453, 604 N.E.2d 463 (2d Dist. 1992), *appeal denied*, 149 Ill. 2d 649, 612 N.E.2d 513 (1993).

On November 3, 1993, after the October 31, 1993 discovery cutoff date and while the University's motion to dismiss was pending, Hindo sought leave to file his Second Amended Complaint adding additional allegations of harassment by the University in "retaliation" for Hindo's reporting of the alleged fraudulent billing. The University objected, and, on November 3, 1993, District Court Judge John F. Grady denied Hindo leave to file his Second Amended Complaint. (PA 22a-23a.) On December 7, 1993, Judge Grady granted the University's motion to dismiss Count III "due to the preclusive effect of the judgment on Hindo's state retaliatory discharge claim." (PA 29a.)

At the outset of the November 21, 1994 bench trial, Hindo moved to dismiss Count II pursuant to FED. R. CIV. P. 41(a). (Tr. 2-3.) The trial court granted that motion with prejudice, and the trial proceeded only on Count I. (Tr. 3.) After the parties made their opening statements, Judge Grady asked the parties to research some legal issues relating to Count I and adjourned the proceedings until the next morning.[1] (Tr. 39-41, 47.)

The next morning, after the parties reported on their research, Judge Grady elected to proceed under FED. R. CIV. P. 52(c). Specifically, he directed the parties to present their

---

[1] Hindo's assertion that Judge Grady "interrupted the trial, making a 12(b)(6) motion to dismiss *sua sponte*" (Petition, p. 4) is wrong. Because Hindo dropped Count II, which contained the only allegations that the University knowingly submitted invoices for work that had not been performed, the complexion of the case changed drastically. (Tr. 45.) It was against this background that Judge Grady asked the parties to research issues to "iron out the legal question before we spend time taking evidence." (Tr. 45.) Hindo's own counsel agreed that there was "no sense" in taking evidence until that research was completed. (Tr. 45-46.)

evidence on the issues of whether the University's invoices were false, and what the University and the NCVAMC knew about the status of VA funding for the radiology residents when the University invoiced the NCVAMC for the radiology residents' salaries and benefits. (Tr. 69-72.) At the close of Hindo's case, the University moved for a directed verdict under Fed. R. Civ. P. 52(c) because the evidence at trial and applicable law confirmed that the University had not made any false claims. Judge Grady granted that motion and entered judgment for the University. (PA 15a-18a.) Hindo then appealed.

STATEMENT OF FACTS

The University disagrees with Hindo's statement of facts. The University incorporates in this Brief the Seventh Circuit's statement of facts. *Hindo*, 65 F.3d at 610-12. Accordingly, only two matters require further examination: (1) Hindo's assertion that the NCVAMC made its request for a refund from the University "in direct response to Hindo's letter" to the Veterans Administration (Petition, p. 5); and (2) Hindo's conclusory statements as "fact" that the University engaged in various acts of retaliation (Petition, pp. 6, 25-26).

The evidence at trial confirmed that the NCVAMC requested a refund from the University as the result of its own internal investigation, not in response to Hindo's letter to the VA. (*See, e.g.*, Tr. 337-38.) The Seventh Circuit agrees. *Hindo*, 65 F.3d at 612.

The allegations of retaliation by the University all come from Hindo's proposed Second Amended Complaint, the very same Complaint that Judge Grady denied Hindo leave to file.

(*See* PA 22a-23a, 26a-29a.) Hindo did not testify at trial and there is no trial testimony or evidence to support any of these claimed "facts."

REASONS FOR DENYING THE WRIT

Despite being given the chance to intervene in and take over this *qui tam* case, the United States Government elected not to do so. This case does not raise any constitutional issues. There is no conflict between the Seventh Circuit's decision below and any decisions of this Court or of other Courts of Appeals.

Hindo's Petition raises no important legal issues. Instead, the Petition merely asserts that the decisions below make erroneous factual findings or misapply properly stated rules of law. Rule 10 of this Court provides that a petition for a writ of certiorari is "rarely granted" in such cases. This is not the rare case that warrants a writ of certiorari.

Moreover, the decisions below were correct.

I. THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS ON THE QUESTIONS PRESENTED.

The False Claims Act provides liability to one who "knowingly presents" to the United States Government "a false or fraudulent claim for payment." 31 U.S.C. § 3729(a). To meet the definition of "knowingly," Hindo must

demonstrate that when the University claimed monies due from the NCVAMC, it:

> (1) had actual knowledge of the falsity of the information at issue;
>
> (2) acted in deliberate ignorance of the truth or falsity of that information; or
>
> (3) acted in reckless disregard of the truth or falsity of the information.

31 U.S.C. § 3729(b).

"The phrase 'known to be false' . . . does not mean 'scientifically untrue'; it means 'a lie.' The Act is concerned with ferreting out 'wrongdoing,' not scientific errors." *Wang v. FMC Corp.*, 975 F.2d 1412, 1421 (9th Cir. 1992). The cases cited by Hindo agree with this standard. *See United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1421 (9th Cir. 1991) (intent requires "deliberate ignorance" or "reckless disregard"); *Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1043 (Fed. Cir. 1994) (same standard; defendant admitted knowledge of falsity of claim). This is the same standard followed by the Seventh Circuit in its decision below. *Hindo*, 65 F.3d at 613.

Hindo attempts to manufacture a conflict between the Seventh Circuit's decision and decisions of this Court and other Courts of Appeals. However, the cases that he cites as evidence of such a conflict are not inconsistent in any way with the Seventh Circuit's decision.

For example, Hindo cites *Hagood* for the proposition that the government's knowledge is irrelevant under the False Claims Act. (Petition, p. 22.) But, that case does not say that. When reviewing the dismissal of a complaint for failure to

state a claim, the *Hagood* Court held that the government's knowledge does not automatically bar an action under the False Claims Act. *Hagood*, 929 F.2d at 1421. However, once the case proceeds beyond the complaint stage, the government's "knowledge may show that the defendant did not submit its claim in deliberate ignorance or reckless disregard of the truth." *Id.* That is entirely consistent with how the courts below ruled in this case. *Hindo*, 65 F.3d at 613-14.

Young-Montenay, Inc. v. United States, 15 F.3d 1040 (Fed. Cir. 1994), also relied on by Hindo as evidence of a conflict among the courts, is inapplicable. In that case, a contractor admittedly submitted a claim for more than he was then owed on the project to get bigger payments at the beginning of the project (a practice known as "front-end loading"). *Young-Montenay*, 15 F.3d at 1042-43. Here, on the other hand, there was no evidence that any of the amounts claimed by the University were front-end loaded. Instead, the evidence here showed that none of the information on the invoices at issue was false and that the radiology residents performed valuable services while at the NCVAMC. *Hindo*, 65 F.3d at 613-14.

Hindo also cites two decisions by this Court in the "Reasons for Granting the Writ" section of his Petition. (Petition, p. 10.) The first, *Abbott Labs v. Portland Retail Druggists Ass'n*, 425 U.S. 1 (1976), is a Robinson-Patman Act case, not a False Claims Act case. And, it is never mentioned again in the Petition. The second, *Heckler v. Community Health Services*, 467 U.S. 51 (1984), dealt with a claim by a health care provider that the government was estopped from denying it reimbursement for medicare funds. The provider claimed that statements made to it by an employee of a

company which administered the program bound the government to provide benefits to the provider. *Heckler*, 467 U.S. at 55-57. This case, on the other hand, is not an estoppel case.

In sum, there is no conflict. The Seventh Circuit properly followed well-established parameters for determining liability under the False Claims Act. Petitioner's disappointment with the lower courts' results does not arise from any conflict between the courts. Rather, it results from Petitioner's belief that the decisions below were based upon misguided findings of fact. That does not justify the issuance of a writ of certiorari.

II. THE UNIVERSITY DID NOT VIOLATE THE FALSE CLAIMS ACT.

The University's invoices to the NCVAMC were "claims" under Section 3729(c) of the False Claims Act. Therefore, the issue here is whether those claims were false and, if so, did the University know they were false when it submitted them to the NCVAMC. Because the invoices contained no false information, Hindo was forced to argue that those invoices contained false implied representations that the NCVAMC had in fact procured funding for the two radiology residents included in the invoices. As the Seventh Circuit stated, however, this argument "fails because it distorts the record produced at trial and misapprehends the law." *Hindo*, 65 F.3d at 613.

The evidence at trial confirmed that the University's belief that the NCVAMC would obtain funding for the radiology residency positions for the 1989-90 academic year was reasonable. Those positions had been funded for the previous academic year. The NCVAMC wanted the radiology residents

to continue at the NCVAMC in the 1989-90 academic year. The District Court found, and the Seventh Circuit agreed, that the NCVAMC repeatedly told the University that it hoped to get the funds and was pursuing a number of alternatives for doing so. *Hindo*, 65 F.3d at 611-12. Even in June, 1989 (well after the University had committed to hire two additional radiology residents to fill the NCVAMC positions), the parties remained hopeful that funding would ultimately be procured. *Id.* at 612. Indeed, prior history confirmed that such funding could have been procured even after the start of the 1989-90 academic year. (*Id.*; Tr. 179.)

The University stipulated at trial that it was advised on several occasions that the NCVAMC had not, as of the dates of those communications, obtained funding for the radiology residents.[2] (Tr. 71-72.) The University, however, was not told until July, 1990, when the NCVAMC first asked for a refund, that the NCVAMC had not in fact obtained such funding. (Tr. 182, 270.)

When the radiology residents reported to the NCVAMC radiology service in July, 1989, nobody at the NCVAMC told them or the University that they were unwelcome, unauthorized or unfunded. Instead, the NCVAMC, the very party having the most accurate information as to the status of funding, allowed the residents to rotate through the NCVAMC, recorded their time, forwarded its time records to the University, processed the invoices and paid the University $45,801.88 for the residents' services.

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[2] Hindo overstates the University's stipulations at trial. The University never stipulated that when it submitted its invoices, it knew that the NCVAMC had not procured funding. (Tr. 71-72; PA 42a-46a.)

In the end, the NCVAMC got a big windfall. The University refunded, to the penny, the $45,801.88 that the NCVAMC paid for reimbursement of the radiology residents' salaries and benefits. It did so even though the NCVAMC received valuable services and other benefits from those residents throughout the entire 1989-90 academic year. The bottom line is that the NCVAMC truly got something for nothing.

The irony here is that relator, now claiming to represent the very party who got something for nothing, asserts that the free benefits conferred upon the NCVAMC give rise to a false claim. The NCVAMC has suffered no loss. Hindo has no claim.

III. THE TRIAL COURT PROPERLY DENIED HINDO LEAVE TO FILE HIS SECOND AMENDED COMPLAINT.

This is not a *res judicata* case. In his brief, Hindo "concedes that the retaliatory demotion alleged in the Lake County case is barred by *res judicata* in this case." (Petition, p. 24.) However, Hindo argues that his "harassment, and other acts of discrimination" allegations are "new and different cause[s] of action." (Petition, p. 26-27.) But, those allegations of harassment all come from Hindo's proposed Second Amended Complaint that Judge Grady denied Hindo leave to file.

Thus, the proper issue, and the one examined by the Court of Appeals below, was whether the trial court abused its discretion in denying Hindo leave to amend his Second Amended Complaint. Hindo's Petition does not address that issue. Thus, Hindo offers no explanation of why he waited until after the close of discovery to seek leave to file his

Second Amended Complaint. Extensive discovery had already taken place, and the alleged "facts" at issue had been known to Hindo for some time. Judge Grady was well within his discretion to reject Hindo's belated Second Amended Complaint. *See Sanders v. Venture Stores, Inc.*, 56 F.3d 771, 773-74 (7th Cir. 1995) (citations omitted) (denial of motion for leave to amend a complaint reviewed for abuse of discretion).

As the Seventh Circuit stated at 65 F.3d at 615:

> A denial is particularly warranted in instances in which the plaintiff has failed to provide an explanation as to why the amendment did not take place sooner, and where the delay in granting the motion to amend would cause delay and burden the parties. [citation omitted] This is Hindo's case. Hindo (and other plaintiffs) are advised to take note of our admonition in *Sanders*, 56 F.3d at 775 (quoting William Shakespeare, Twelfth Night, II 42.), "In delays there lies no plenty."

CONCLUSION

The writ of certiorari should be denied.

Respectfully submitted,

ERIC A. OESTERLE
Counsel of Record
DONNA L. MARKS
SONNENSCHEIN NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000

MICHAEL R. BOODEN
Herman M. Finch University of Health Sciences/The Chicago Medical School
3333 Green Bay Road
North Chicago, IL 60064
(708) 578-3321

Attorneys for Respondent University of Health Sciences/The Chicago Medical School (n/k/a Herman M. Finch University of Health Sciences/ The Chicago Medical School)

§ 3729. False claims

(a) **Liability for certain acts.** – Any person who –

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

> (A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;
>
> (B) such person fully cooperated with any Government investigation of such violation; and
>
> (C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **Knowing and knowingly defined.** – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **Claim defined.** – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **Exemption from disclosure.** – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) **Exclusion.** – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1954.

§ 3730. **Civil actions for false claims**

(a) **Responsibilities of the attorney general.** – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) **Actions by private persons.** (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

(c) **Rights of the parties to Qui Tam actions. – (1)** If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to Qui Tam plaintiff. – **(1)** If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not

more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue to action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. – (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official

if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in section[1] paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) **Government not liable for certain expenses.** – The Government is not liable for expenses which a person incurs in bringing an action under this action.

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[1] So in original. See 1990 Amendment note.

(g) **Fees and expenses to prevailing defendant.** – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, limitation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

(As amended Pub.L. 99-562, §§ 3, 4, Oct. 27, 1986, 100 Stat. 3154, 3157; Pub.L. 100-700, § 9, Nov. 19, 1988, 102 Stat. 4638; Pub.L. 101-280, § 10(a), May 4, 1990, 104 Stat. 162.)